

No. 89-1270

Supreme Court, U.S.  
FILED

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JOSEPH F. SAPNIOL, JR.  
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In The  
Supreme Court of the United States  
October Term, 1989

THOMAS R. McNELL  
AND SAMUEL McNELL,

*Petitioners,*

v.

MAX HUGEL,

*Respondent.*

On Petition For A Writ Of Certiorari To  
The United States Court Of Appeals  
For The First Circuit

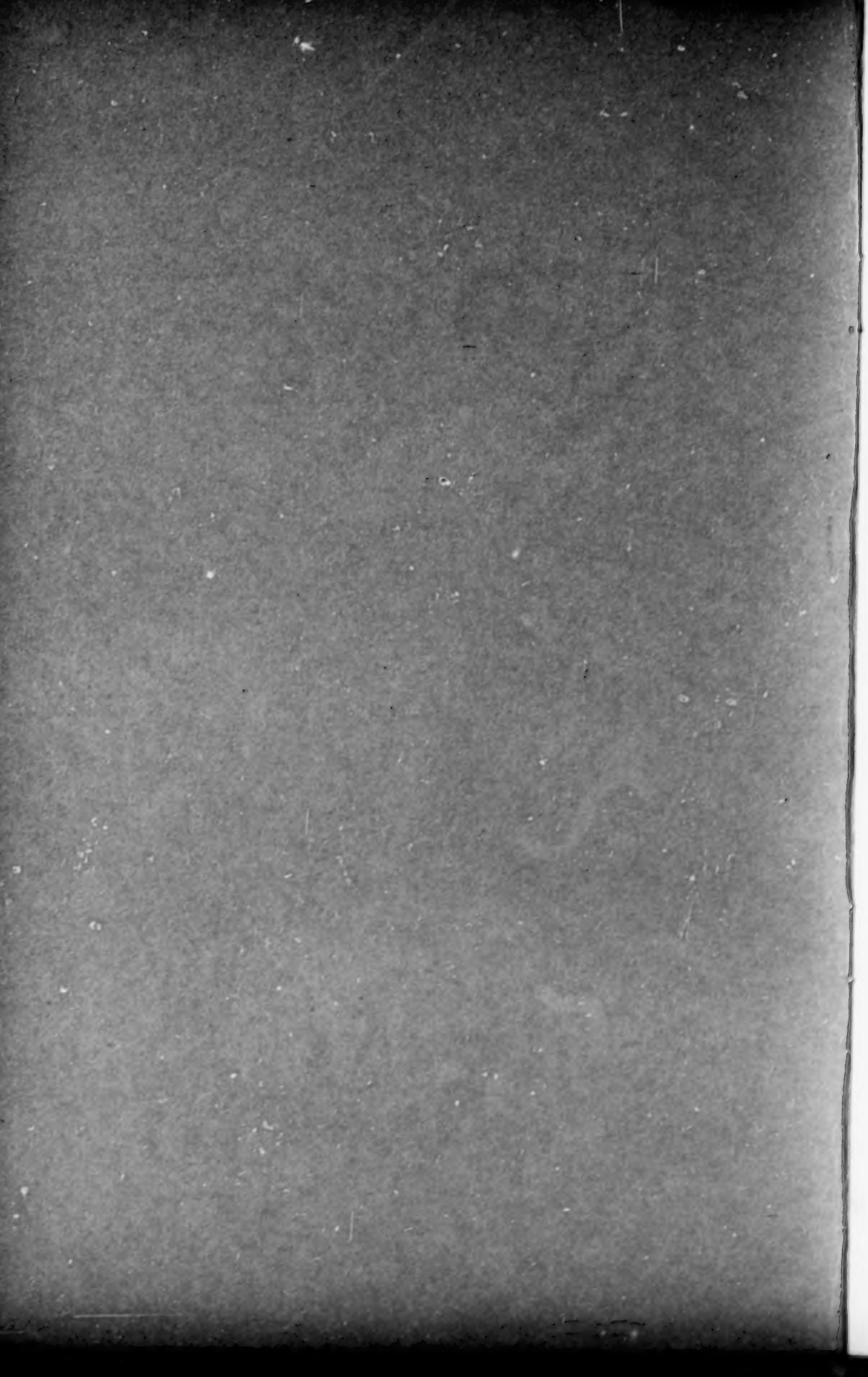
BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI

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## COUNTER-STATEMENT OF THE CASE

With the exception of the brief procedural background which follows, the Respondent relies upon the decisions of District Court (B1-B11) and the Circuit Court (A1-A12) as accurate statements of the case.<sup>1</sup>

### Proceedings in the District Court

On November 3, 1982, Mr. Hugel filed suit for libel and slander against the McNells in the United States District Court for the District of New Hampshire. (App. 1-13). Unable to locate the fugitive McNells, he provided service by a publication in accordance with an order issued by the District Court. (App. 59-60). In addition to the publication notice provided for by the District Court's order, Mr. Hugel took it upon himself to issue press releases which were distributed nationwide by UPI whenever there were significant developments in the litigation. (B9). The McNells did not appear and were eventually defaulted. (App. 81-83). In support of his motion for a default judgment, Mr. Hugel filed an affidavit with the District Court setting forth sworn testimony concerning the McNells' systematic contacts with the State of New Hampshire. (C1, C2). On September 25, 1984, almost two years after the action was originally filed and after discovery had been taken and evidence presented, Mr.

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<sup>1</sup> Reference to the Appendix in the Petition are designated "A" and "B". Reference to the Appendix to the Briefs submitted to the Circuit Court are designated "App." References to the Appendix in this Brief are designated "C".

Hugel was awarded a judgment in the amount of \$931,000. (A4)

In October of 1987, Tom and Sam McNell filed a Motion to Set Aside the Default Judgment entered against them in the District Court. Tom and Sam argued that the judgment was void for lack of personal jurisdiction, that the allegations in the complaint were insufficient to establish diversity of citizenship, that they had been denied due process because they had not received actual notice of the pendency of the action and that the District Court should have exercised its discretionary power under Federal Rule of Civil Procedure 60(b)(6) to grant them relief from the judgment. (B4-B11). In support of this motion, the McNells submitted a memorandum of law and a number of affidavits. (App. 132-223). These affidavits concerned factual matters pertaining to the McNells' arguments based upon diversity, due process and Rule 60(b)(6) (App. 132-223).

None of the affidavits provided to the District Court related in any way to the complaint's allegations concerning the basis for personal jurisdiction over the defendants within the State of New Hampshire. (App. 132-223). Nor did these affidavits in any way relate to or controvert the jurisdictional allegations set forth in Mr. Hugel's affidavit. (C1, C2).

On January 27, 1988, the McNells were afforded a full hearing on their motion to vacate. (App. 220-273) The McNells did not present evidence or witnesses at the hearing. Nor did they, either prior to or after the hearing, attempt to take depositions or undertake other discovery

concerning the jurisdictional allegations.<sup>2</sup> The complaint's jurisdictional allegations were not challenged at any point during the hearing. (App. 220-273) At the conclusion of the hearing the District Court permitted the McNells additional time to submit any further affidavits they felt necessary. (App. 271-72) None of the affidavits submitted after the hearing had any bearing on the personal jurisdiction issue. (App. 132-223)

Neither the McNells' motion, memorandum of law (Docket #32), arguments presented at the January hearing (App. 230-273), nor any of the affidavits submitted on behalf of the McNells (App. 132-223) ever raised a claim that the McNells had controverted the complaint's allegations concerning personal jurisdiction or that the jurisdictional issue should be decided on the basis of anything other than the allegations contained in the complaint. (App. 230-273).

The District Court denied the McNells' Motion for Relief from Judgment, specifically addressing in its order each of the arguments raised by the defendant. (B1-B11).

### **Proceedings in the Circuit Court**

The McNells appealed to the United States Court of Appeals for the First Circuit. In a reply brief filed in the Circuit Court, the McNells articulated, **for the first time**,

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<sup>2</sup> The McNells' attorneys did eventually depose Mr. Hugel in enforcement proceedings following this judgment. Mr. Hugel's sworn testimony in that deposition served simply to confirm and amplify the jurisdictional allegations in the complaint.

an argument that the allegations set forth in Mr. Hugel's complaint concerning personal jurisdiction needed to be supplemented with affidavits or other evidence in order to meet the burden of establishing a *prima facie* showing of personal jurisdiction. In his brief and during oral argument before a three-member panel of the Circuit Court, Mr. Hugel specifically advised the panel that the McNells had not challenged the factual allegations concerning personal jurisdiction with affidavits or other evidence in the District Court. Indeed, in the District Court, the McNells' arguments concerning personal jurisdiction were based solely upon the allegations set forth in the complaint. (Docket #32; App. 230-273).

The Circuit Court affirmed the District Court's decision as to each claim of error raised by the McNells. (A1-A12).

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### REASONS FOR DENYING THE WRIT

#### I. The Petition is Based Upon Misstatements of the Lower Courts' Decisions and the Record Supporting Those Decisions.

By means of factual misrepresentations made throughout the petition<sup>3</sup>, the McNells would have this Court believe the following: 1) That the McNells attempted, by affidavit, to controvert the complaint's well-pled averments concerning personal jurisdiction; 2) That the District Court and the Circuit Court "deliberately

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<sup>3</sup> Without the requisite citations to the record.



ignored the affidavits"; and 3) That, beyond the averments in the complaint, the record is void of evidence documenting the McNells' contacts with New Hampshire.

Each of these representations is false. The truth concerning each statement is readily apparent from a review of the record.

**1) The McNells Did Not Attempt To Controvert The Complaint's Averments Concerning Personal Jurisdiction.**

Contrary to the Petitioners' assertions, the McNells did not provide to either the District Court or the Circuit Court affidavits challenging the allegations supporting personal jurisdiction in the complaint. Although the petition repeatedly faults both lower courts for ignoring the affidavits of Tom and Sam, there were no affidavits on the issue of personal jurisdiction to ignore. The petition fails to identify or provide to this Court the affidavits which supposedly controvert the jurisdictional allegations set forth in the complaint.<sup>4</sup> Although a number of affidavits were filed in this case (App. 132-223), none of these affidavits related in any way to the personal jurisdiction issue.

The Petitioners have not cited, nor is the Respondent aware of, any case which suggests that a judicial determination concerning personal jurisdiction need go beyond the well-pled allegations of the complaint, where

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<sup>4</sup> Pursuant to Supreme Court Rule 21.5, Petitioners' failure to identify and present these affidavits for the Court's consideration warrants denial of the petition.

the defendants have failed to controvert the jurisdictional allegations in the complaint with contradictory evidence. The Petitioners' claim that the Circuit Court's decision is somehow in conflict with the decisions of this Court and other circuit courts because it failed to consider controverting affidavits is, consequently, based upon a fiction.

**2) The Lower Courts Disbelieved, Rather Than Ignored, The McNells.**

In faulting the lower courts because they "deliberately ignored the affidavits submitted by Tom and Sam McNell," the Petitioners do a double disservice to both the District Court and the Circuit Court. Not only did the affidavits submitted by Tom and Sam have nothing to do with the personal jurisdiction issue, it is clear from the record that those affidavits were properly considered by the lower courts relative to the issues to which they pertained. The bizarre allegations contained in the affidavits were considered. The allegations were, however, neither believed nor believable:

This Court does not find credible defendants' allegations of patriotic whistle-blowing, driven into hiding by fear of plaintiff's possible reprisals. Defendants feared the FBI, not the plaintiff. To reward the defendants for the embezzlement, flight and other criminal activity would be a grave injustice.

(B10).

The district judge simply did not believe the McNells' portrayal of themselves as victims of circumstances and the misdeeds of Hugel. It is this type of determination which the district

judge is in the best position to judge, and we see no reason to overturn his judgment.

(A11).

Thus, the lower courts did not ignore the McNells' affidavits. The affidavits were simply irrelevant to the question of personal jurisdiction and lacked any credibility, even as to those issues to which they related.

**3) Beyond the Complaint's Averments, the Record Provided Ample Support for Personal Jurisdiction Over the Defendants.**

Without making reference to the record,<sup>5</sup> the Petitioners have represented to this Court that the record is void of evidence concerning the McNells' connection to New Hampshire. The petition goes so far as to represent that, "McNell had no connection whatsoever with New Hampshire: He did no business there, made no visits there, and deprived no economic benefit from there." (Petition, p. 13). This representation is in direct conflict with the only evidence in the record on that subject. (C1, C2). Mr. Hugel's affidavit, which was filed in support of his motion for a default judgment and was part of the Appendix in the Circuit Court (App. 78-79), contains Mr. Hugel's sworn allegations that both Tom and Sam repeatedly communicated with him both over the telephone and in personal visits to Centronics' headquarters in Hudson, New Hampshire. (C1). Again, the Petitioners' request for review by this Court is based upon a falsity.

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<sup>5</sup> See, Supreme Court Rules 21.5 and 34.5.

## II. The Decision of the Circuit Court is in Harmony With Decisions of the Supreme Court and Other Circuits.

The petition fails to meet the criteria for review by this Court on a Writ of Certiorari. The analysis concerning personal jurisdiction utilized by the Circuit Court and the District Court closely follows the precedent established by the United States Supreme Court in *Calder v. Jones*, 465 U.S. 738, 104 S.Ct. 1482, 79 L.Ed. 2d 804 (1984). The petitioners argue, as they did in the District Court and the Circuit Court, that *Calder* is distinguishable because the defendants in that case were employees of the publication which printed their libelous allegations. The lower courts, however, correctly followed Supreme Court precedent in rejecting this argument. (A7-A8) (B6-B7). In *Calder*, the Supreme Court expressly stated that its evaluation of the defendants' contacts with the forum state was independent of the defendants' employment by the newspaper:

Petitioners [*Calder* and *South*] are correct that their contacts with California are **not to be judged according to their employers' activities there . . . Each defendant's contacts with the forum state must be assessed individually.** In this case, petitioners are primary participants in an alleged wrong-doing intentionally directed at a California resident, and jurisdiction over them is proper on that basis.

*Id.* at U.S. 790, L. Ed. 2d 813 (citations omitted) (emphasis added). In *Calder*, the Supreme Court established the constitutional parameters for assertion of personal jurisdiction over nonresident defendants in a suit for libel and slander. The *Calder* decision specifically addressed the

scope of such jurisdiction as it related to a nonresident defendant whose tortious activity takes place entirely beyond the borders of the forum state. *Id.* at 787 n.6.

Thus, the Circuit Court and District Court decisions fall squarely within the parameters of Supreme Court precedent.

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### THE PETITION IS FRIVOLOUS

For reasons which are self-evident, the Petition is a frivolous deception. The Respondent respectfully requests appropriate damages, including attorneys' fees and double costs, pursuant to Supreme Court Rules 49.2 and 50.7.

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### CONCLUSION

For the foregoing reasons, the petition should be denied and the Respondent awarded appropriate damages pursuant to Supreme Court Rules 49.2 and 50.7. The decisions of the Circuit Court and the District Court are in full accord with the relevant Supreme Court precedent. The only "conflict" presented by the petition is the discrepancy between the Petitioners' version of the proceedings below and the record actually created in the District Court and Circuit Court.

Respectfully submitted,

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APPENDIX C  
UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF NEW HAMPSHIRE

\*\*\*\*\*  
Max Hugel, \*  
 \*  
Plaintiff \*  
 \*  
v. \* CIVIL ACTION  
 \* NO. 82-615-L  
Thomas R. McNell and \*  
Samuel F. McNell, Jr. \*  
 \*  
Defendants \*  
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AFFIDAVIT  
(Filed Jan. 18, 1983)

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STATE OF NEW HAMPSHIRE  
HILLSBOROUGH, SS.

Max Hugel, being duly sworn, deposes and says:

1) I am the plaintiff in this proceeding.

2) Between the years 1975 and 1980, I was the Executive Vice-President of Centronics Data Computer Corporation of Hudson, New Hampshire.

3) During all or part of this time, the defendants, Thomas R. McNell and Samuel F. McNell, Jr. were engaged in the securities business and participated in making a market in the stock of Centronics.

4] From time to time, meetings were held in the principal office of Centronics in Hudson, New Hampshire for the purpose of furnishing information to various analysts and other persons interested in the marketing of Centronic stock.

5] On several occasions during this period, the defendants attended such meetings and participated in the analysis of Centronics stock for the purpose of improving its marketability and in pursuit of their own securities business.

6] To my knowledge, they also communicated by long distance telephone for such purposes with the officers and directors of Centronics Data Computer Corporation.

/s/ Max Hugel  
MAX HUGEL

STATE OF NEW HAMPSHIRE  
HILLSBOROUGH, SS.

Personally appeared before me, the undersigned officer, Max Hugel, and made oath that the foregoing statements by him subscribed are true and accurate to the best of his knowledge and belief.

/s/ Florence J. Kearns  
Justice of the Peace

Dated: January 14, 1983.

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